necessarily terminate the corporation. But it is unquestionable that the enemy shares can continue to earn profits during the war and that their owners can after the war claim the benefits.[29]

The present war has developed a compromise between preservation and confiscation of the enemy's interest in associations. At common law, when it was still proper to confiscate the enemy's private property, the enemy partner's share vested in the Crown. Now the Alien Property Custodian is usually appointed to assist in the winding up of partnerships and to sequestrate the enemy's share. With respect to corporations, the Alien Property Custodian is empowered either to receive the dividends of enemy owned stock, or to sell it to nationals or to vote it and with it obtain representation on the Board of Directors. He is been further empowered to wind up any business which, by reason of enemy control, was carried on wholly or mainly for the benefit of enemy aliens.[30] Whether and how far this policy may result in confiscation of private property it will of necessity be difficult to judge until after the treaty of peace has been adopted and supplemented by municipal legislation.

ESTOPPEL BY MISREPRESENTATION AND THE RECORDING ACTS

The doctrine of estoppel by misrepresentation in its general outlines is simple enough; its application to concrete cases involves many difficulties. Chief among these is the determination of whether given facts constitute a misrepresentation. This is due not merely to the ambiguity of language but also to the fact that representations can be made by conduct. The difficulty in each case is to determine just what representations are fairly to be understood from the words and conduct in question. To what extent, for example, does a person who is the "true owner" of property represent that the "true ownership" is vested in one to whom he transfers it, or has it transferred, by instruments of title which contain no indication that the person in whose favor the documents of title are drawn is not the true owner? This question has of course arisen most frequently in English law in connection with the assertion of equitable claims to property. To a brief discussion of some phases of this problem the present comment will be devoted.

It is well settled in English law that one may cause land purchased by him to be conveyed to a trustee by a deed which does not reveal the trust and which even contains a statement that the grantee has paid the purchase money, and hand over this deed to the grantee, all without losing his equitable claim even as against a purchaser, provided the

[29] *Daimler v. Continental Tyre Co., ubi supra*, 347.

[30] British Act of January 27, 1916. United States Act of March 28, 1918. A comparison of the practice of various belligerents is to be found in (1918) 12 AMER. JOUR. OF INT. LAW, 744 ff. by J. W. Garner.

latter has not obtained the "legal title."[1] So also he may transfer his own property to a single trustee by an instrument which does not disclose a trust, and yet enforce his equitable claim against a purchaser or mortgagee from the trustee, if only such purchaser has not obtained the "legal title."[2] The acts of the equitable claimant in giving the trustee such "indicia of ownership" are not regarded as carrying a representation that there is no equitable claim. This conclusion is of course based upon the proposition that, given the English system of law—including equity law—and the ideas prevalent among Englishmen who have to deal with such matters, an "ordinarily reasonable and prudent man" would not draw such an inference. If, however, in the case last put, the instrument of transfer contains in addition a recital that the grantee has paid the full purchase price to the grantor, it has been held that there is in all fairness a representation that the grantee is the "true" or absolute owner, at least so far as claims of the grantor are concerned.[3] Given this representation, it follows that as against any one who changes his legal position to his detriment in reasonable reliance upon it, the equitable claimant is estopped from claiming the property as effectively as he would have been if he had made the representation in so many words.

Ordinarily, therefore, according to English law, to permit a trustee to hold documents of title which fail to disclose any trust is not to represent that none exists. In such cases to obtain protection, when dealing with the trustee, a purchaser or mortgagee must bring himself within the doctrine of purchaser for value without notice by acquiring the "legal estate" as well as parting with "value," and so cannot rely merely upon estoppel by misrepresentation.

How stands the matter if to the English system we add the American system of recording acts? Is the situation altered? Fully to appreciate the problem raised by these questions we must first of all note that some of the recording acts are so worded as to protect not only subsequent transferees, mortgagees and persons similarly situated, but

[1] *Carritt v. Real and Personal Advance Co.* (1889) 42 Ch. D. 263.

[2] *Shropshire Union Ry. etc. Co. v. Regina* (1875) L. R. 7 H. L. 496 (shares of stock). *Cf.* also *Edge v. Worthington* (1786) 1 Cox Ch. C. 211; *Cave v. Cave* (1880) 15 Ch. D. 639; Ewart, *Estoppel by Misrepresentation,* 265. If the one advancing the money also obtains the certificates of stock endorsed with a power of attorney authorizing their transfer, the American authorities regard him as a *bona fide* purchaser for value. *Duebar Watch Co. v. Daugherty* (1900) 62 Oh. St. 589, 57 N. E. 455. See discussion in Cook, *Alienability of Choses in Action* (1917) 30 HARV. L. REV. 478.

[3] *Rimmer v. Webster* [1902] 2 Ch. 163. The doctrine of "reputed ownership," first introduced into English bankruptcy law by the Statute of 1623 (21 Jac. I, c. 19, sec. 11) and incorporated in every successive English bankruptcy law (46-7 Vic. c. 52, sec. 44), applied only to bankruptcy cases and covered only "reputed ownership" of chattels. Glenn, *The Rights and Remedies of Creditors,* sec. 181. The American bankruptcy law does not include any such clause, nor is it found in state statutes. *Ibid.* sec. 198.

also creditors who without taking any conveyance or mortgage advance their money in reliance upon the "record title."[4] In states having statutes of that kind the problem discussed in the present comment does not, therefore, arise.

In a large number of states, however, the recording acts provide in so many words only for the protection of "purchasers" as distinguished from "creditors."[5] In spite of this, the courts in many of these states have found it possible, within certain limits, to protect creditors who have not obtained a lien upon any specific property by invoking the doctrine of estoppel by misrepresentation. The problem may be put as follows: If the instruments of title (which, although they disclose no trust, are not under the English law regarded as carrying a representation that equitable claims do not exist) are to the knowledge of the equitable claimant placed upon record, and if in addition the person who thus holds the "record title" is placed in possession of the property in question, what is an ordinarily reasonable and prudent person entitled to infer? Does one act prudently if he infers that the one thus in possession and holding the "record title" is the "true owner"? If so, then if anything of value is advanced in reliance upon such an inference, the doctrine of estoppel by misrepresentation applies. Whether such an inference can legitimately be drawn, however, is a question of fact, and we must accordingly be prepared for differences of opinion on the part of those who have to answer it. In the recent case of *Bergin v. Blackwood* (1919, Minn.) 170 N. W. 507, the equitable claimant knew that the "record title" stood in the name of a person who was carrying on a business which involved the incurring of indebtedness. He did not know that this person who had the "record title" was stating to those giving him credit that the property in question was in truth his own, nor did he know that the creditors were relying both upon this statement and upon the record. It was held that the apparent owner's trustee in bankruptcy could recover for the benefit of unsecured creditors the property in question from the equitable claimant, to whom the apparent owner had conveyed it when he was faced with bankruptcy proceedings.

The exact limits of the doctrine applied in the principal case are difficult to define—indeed, there is much difference of opinion upon the part of the courts which recognize the doctrine in some form. Apparently nearly all are agreed that a mere omission to record an instrument which would reveal the existence of the claim is not of itself sufficient to estop the claimant,[6] although the appearance to the

[4] Glenn, *op. cit.*, sec. 213.

[5] There is much dispute in these jurisdictions as to whether a purchaser at an execution sale is a "purchaser," and, if so, just when he becomes a purchaser. *Cf.* Glenn, *op. cit.*, sec. 212.

[6] *Sawyer v. Turpin* (1875) 91 U. S. 114; *Rogers v. Page* (1905, C. C. A. 6th) 140 Fed. 596; Glenn, *op. cit.*, sec. 216.

creditors is in that case the same as when the failure to record is intentional. There is, be it noted, in connection with the whole doctrine of estoppel by misrepresentation much conflict of view as to whether purely innocent misrepresentations furnish a basis for estopping the one making them;[7] and it seems clear that in the class of cases under consideration most courts require at least something more than an unintentional, non-negligent representation. There is much talk in the cases of "fraud" and "want of good faith," but these are vague phrases with little meaning.

How far, then, do the cases actually go in estopping, as against unsecured creditors as well as purchasers, the claimant who has not recorded? Apparently there is a fair degree of unanimity in holding that if the failure to record is intentional and by agreement with the holder of the record title, the estoppel exists.[8] One of the cases which protects the creditors most liberally was decided in 1913 by the Connecticut Supreme Court of Errors.[9] A wife for years permitted her husband to appear as the holder of record of the title to all her property. Apparently he was not engaged in business and did not incur business debts. With her knowledge he became a stockholder in a corporation. Unknown to her he became surety upon an "officer's receipt" in order to release certain property of the corporation from an attachment at the hands of a creditor of the latter. Before accepting him as surety the persons involved examined the record of title and relied in accepting him upon his apparent ownership of the property in question. Before it became certain that he would ever be called upon as surety to pay anything, the husband conveyed the property to the wife. Having failed after judgment and execution against the corporation to obtain payment of his claim, the creditor obtained judgment against the husband as surety and then—apparently about two years after the reconveyance to the wife—filed a judgment-lien upon the property and brought an action to foreclose it. It was held that the wife was estopped to assert title in herself.[10]

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[7] Ewart, *Estoppel by Misrepresentation,* chaps. VIII and IX.

[8] *Pierce v. Hoover* (1895) 142 Ind. 626, 42 N. E. 223; *Talcott v. Levy* (1892, Super. Ct.) 20 N. Y. Supp. 440; affirmed (1894) 143 N. Y. 636, 37 N. E. 826.

[9] *Goldberg v. Parker* (1913) 87 Conn. 99, 87 Atl. 555. Roraback, J., dissented.

[10] In the opinion Wheeler, J., says: "Mr. Parker was financially interested in the Chemical Company; he represented that he owned this property; the plaintiff looked up the public records, and ascertained that by them, for years, he had been the owner, and that he had, for over twenty years, owned property of record in Bridgeport, assumed mortgages upon purchases, and given mortgages upon purchases. The titles were such that the most conservative investor or institution would have accepted them and loaned upon their faith. These circumstances were naturally calculated to mislead the plaintiff as they did. The plaintiff did rely upon these titles of record, released his attachment against the Chemical Company, and in its stead accepted an officer's receipt with Mr. Parker as surety. It would be difficult to conceive of a stronger case of equitable estoppel. Any other holding would do violence to the faith which,

In discussing what the misrepresentor must have done in order to be estopped, the Connecticut court said: "The test is whether the act of the wife was naturally calculated to cause the plaintiff to extend credit to her husband. It is not, as has sometimes been suggested, whether the wife had reason to expect credit would be extended to her husband."[11] This general language must, of course, be interpreted in the light of the facts before the court—facts which involved an intentional withholding from the record of any evidence of the wife's interest in order that the husband might "appear as the head of the house." Apparently the great majority of the courts which recognize the doctrine hold that consciously permitting the record title to stand for a considerable period of time is sufficient without other fraudulent intention, provided, be it noted, that the holder of the record title is also left in possession or control of the property.[12] The striking thing about the whole doctrine is that it protects a class of persons—creditors—not provided for in the recording acts in question. This does not mean that the result reached is unsound. It does mean that the recording acts have themselves become operative facts which, taken in connection with the general methods of transacting business which have grown up under the influence of such acts, enable one to make a representation in a way unknown to the English law as we inherited it. The whole doctrine is thus based upon a recognition of the ideas which the

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time out of mind, we have given to our registry laws. With inflexible adherence we have made every title to land, so far as practicable, appear of record. We have held the record constructive notice to all the world of land titles. We have authorized reliance to be placed thereon. We have sustained contracts and conveyances made upon their faith. We cannot hold that a credit, extended in reliance upon the land records, must yield to the equitable owner of the title without doing irreparable injury to the registry laws and going counter to our decisions.

"The maintenance of our system of registry of titles is of the greatest public importance, and he who acts in reliance upon the record has behind him not only the natural equities of his position, but also the especial equity arising from the protection afforded every one who trusts the record."

[11] The learned court then went on to hold that even if the latter test were to be accepted, the facts of the case before it fell within that test. A very large number of the cases, naturally enough, involve husband and wife. The cases of that kind are collected in the monographic note in Ann. Cas. 1914C 1066. The doctrine, however, is not confined to husband and wife. *Susong v. Williams* (1870) 48 Tenn. (1 Heisk.) 625. Nor is it confined to real property. *Williams v. Kirk* (1897) 68 Mo. App. 457.

[12] *McCormick Harvesting Mch. Co. v. Perkins* (1906) 135 Iowa, 64, 110 N. W. 15, and cases cited in Ann. Cas. 1914C 1069. The creditors who assert the estoppel must of course have relied upon the record; but some courts are apparently willing to establish a presumption that they did so rely, as in *Susong v. Williams, supra,* note 11. If a court were to accept the theory that an innocent misrepresentation furnishes a basis for estoppel, it ought logically to hold any failure to record, if continued long enough, equally as effective as an intentional withholding from the record.

courts believe do in fact prevail among business men. Whether such notions really are the prevailing ones is obviously purely a question of fact. If the facts are as the courts have assumed them to be, there can be no question of the soundness of the result, both from the point of view of legal principle and that of sound business policy.

W. W. C.

MASSACHUSETTS TRUSTS AND THE INCOME TAX

Decidedly the Massachusetts trust has advantages over the corporation in this matter of taxation.[1] Some years back, in *Eliot v. Freeman*,[2] the Supreme Court construed the language of the Tariff Act of August 5, 1909, ch. 6,[3] which laid an excise tax on "every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter *organized under the laws of the United States or of any State*."[4] Stressing the word *laws* as opposed to *law*, the Court held that the tax was imposed only on organizations deriving powers from statutory enactment; and that a Massachusetts trust could "hardly be said to be organized, within the ordinary meaning of that term; it certainly was not organized under statutory laws as corporations are." It therefore was not included in the tax. Two years later came the Income Tax Act of October 3, 1913, ch. 16, sec. II G (a),[5] with a change of wording which at least has the appearance of being made to meet the above decision. The tax was to be levied upon the income of "every corporation, joint-stock company or association, and every insurance company, engaged in the United States, *no matter how created or organized*, not including partnerships." The effect of the new statute on the Massachusetts trust came before the Supreme Court in *Crocker v. Malley* (March 17, 1919) U. S. Sup. Ct. Oct. Term, 1918, No. 649.[6] The

[1] The Massachusetts trust is a creation of the profession in Massachusetts, designed originally to supply a means—not available under the corporation law of that state—of quasi-corporate dealing with real estate holdings; transferable trustees' receipts taking the place of shares of stock. It has proved so successful as to be carried over into other fields. According to the constitution of the particular trust, its attributes are in varying degree those of a partnership (the earlier form) and those of a trust (the later form). Closer description, discussion and analysis, together with a collection of the printed material on this form of organization, can be found in S. R. Wrightington, *Voluntary Associations in Massachusetts* (1912) 21 YALE LAW JOURNAL, 311-326; and in COMMENTS (1918) 27 *ibid.* 677-683.

[2] (1911) 220 U. S. 178, 31 Sup. Ct. 360.

[3] 36 Stat. L. 11, 112.

[4] The italics throughout are the editor's.

[5] 38 Stat. L. 114, 166, 172.

[6] For a fuller statement of the facts see RECENT CASE NOTES, *infra, sub. tit.* TRUSTS.